BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Draft Resolution Adopting New Regulations Regarding Public Access to Records of the California Public Utilities Commission and Requests for Confidential Treatment of Records	Draft Resolution No.: L-436 Current Commission Meeting Date: August 23, 2012

COMMENTS OF THE CALIFORNIA ASSOCIATION OF COMPETITIVE TELECOMMUNICATIONS COMPANIES ON REVISED DRAFT RESOLUTION L-436 AND PROPOSED GENERAL ORDER 66-D

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I. INTRODUCTION

The California Association of Competitive Telecommunications Companies (CALTEL) submits these Comments on the revised proposed Resolution L-436.

CALTEL commends the Commission staff for holding a day-long workshop to consider the concerns of CALTEL and other affected parties. CALTEL believes that the Revised Draft Resolution (RDR) is an improvement in some limited respects over the previous version, primarily regarding commitments for future industry-specific workshops.

However, CALTEL still has a number of significant concerns. The most critical of these is that the historically limited use of the California Public Records Act (CPRA) to obtain telecommunications company documents from the Commission is not likely to be a reliable guide to the frequency of such requests in the future. In fact, the processes which the RDR proposes to put into place, unless revised as recommended by CALTEL in the comments that follow, will inevitably encourage carriers to attempt to use the CPRA process to obtain the financial and market share data and other confidential trade secret information of their competitors. Such a result will be harmful to competition in communications markets, and therefore is clearly not in the public interest.

II. THE CPUC DOES NOT HAVE THE AUTHORITY TO RELEASE INFORMATION SUBJECT TO A CPRA EXEMPTION

A. THERE IS NO LEGAL AUTHORITY WHICH SUPPORTS RULE 2.2.3.1

Without valid legal support, the RDR asserts in proposed Rule 2.2.3.1 that the Commission may determine, by some undefined standard, that the application of the exemptions provided by the CPRA to a particular document is "not appropriate." Thus, the RDR incongruously asserts that the Commission's ability to withhold documents from disclosure is controlled by the CPRA and other applicable laws, but that the Commission can disregard the CPRA's exemptions whenever it chooses to do so.

In support of this extraordinary proposition, the RDR cites without discussion: Cal. Govt. Code §6253.3; Cal. Govt. Code §6253(e); *Black Panther Party v. Kehoe* (1974), 42 Cal.App.3d 645; and *Re San Diego Gas & Electric Company* (1993) 49 Cal.P.U.C.2d 241. However, not one of these "authorities" supports the proposition for which it is offered.

Cal. Govt. Code §6253.3 provides:

> A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter.

This provision cannot possibly be read to support the ability of the Commission to override statutory CPRA exemptions. It simply says that each agency has the responsibility for disclosure of its own documents which, under the provisions of the CPRA, are subject to disclosure.

Cal. Govt. Code §6253(e) also provides no support for the proposition for which it is asserted. The drafters of the RDR take a procedural provision out of context in the

vain hope of creating a new substantive right for the Commission which is not sanctioned by statute.

Cal. Govt. Code §6253, of which §6253(e) is the final section, deals only with the manner and speed with which public agencies are required to make documents subject to disclosure under the CPRA available to a requesting party. It does not authorize government agencies to override CPRA exemptions.

Section 6253(a) provides:

> Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record **after deletion of the portions that are exempted by law.** (emphasis added)

Section 6253(b) specifies:

> **Except with respect to public records exempt from disclosure by express provisions of law**, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so. (emphasis added)

Section 6253(c) gives agencies 10 days to respond to CPRA requests, with a possible extension of up to an additional 14 days upon the existence of specified circumstances. Nothing in that provision gives any agency the authority to override CPRA exemptions.

Section 6253(d) provides:

> Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by Section 6255 shall set forth the names and titles or positions of each person responsible for the denial.

Again, there is nothing here to support the position that the CPUC can in its discretion override CPRA exemptions.

Section 6253(e), the section cited by the RDR for this claimed extraordinary power, only gives agencies the right to find ways to respond more rapidly and efficiently to CPRA requests than the minimum requirements of the other sections of Section 6253.

> Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter.

Plainly this provision is not designed to permit agencies to override CPRA exemptions. Documents subject to CPRA exemptions are "otherwise prohibited by law" from disclosure.

The cases cited by the RDR in support of this extraordinary assertion of authority also provide no support. *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645 involved an effort to obtain investigative reports on collection agencies from the state agency charged with regulation of those entities. The regulatory agency had made certain investigative reports available to collection agencies which were subject to investigation. The decision turned on whether, once the agency had made this disclosure, it could then deny disclosure of the same information to another party. The Court found that §6254(f) permits the disclosure of this information which are "records concerning the administration of the agency," but does not permit the disclosure selectively as to requesting parties.

Section 6254 provides:

> Nothing in this section prevents any agency from opening its records **concerning the administration of the agency** to public inspection, **unless disclosure is otherwise prohibited by law**. (emphasis added)

Section 6254 specifically creates a right of agencies with regard to their own administrative files to open those files to public inspection, unless another separate exemption from disclosure applies. In other words, with respect to this specific class of documents (documents concerning agency administration), agencies may release those documents, *except where another statutory exemption applies*.

There is nothing in this decision which permits an agency to create new exemptions not provided by statute, nor to release any documents to which another statutory exemption applies.

Re San Diego Gas & Electric Company (1993) 49 Cal.P.U.C.2d 241, is the last authority cited by the RDR for its extraordinary assertion of Commission authority to ignore statutory exemptions from disclosure under the CPRA. Of course, this is a decision of the Commission itself, and the Commission cannot bestow upon itself administratively the authority to ignore exemptions created by statute. The Commission in that case found that Public Utilities Code §315 did not prohibit the disclosure of utility accident reports; and that under GO 66-C, the Commission could disclose such utility accident reports in its discretion. The Commission also, in unfortunate dicta in that case, used some broad language suggesting that it could, in its discretion, ignore certain CPRA exemptions, citing *Black Panther Party v. Kehoe, supra*, as purported authority for the dicta. See discussion of that case above. However, that dicta misinterprets the case which it references, is contrary to law, and was not necessary to a resolution of the matter then before the Commission. Therefore, the *Re San Diego Gas & Electric Company* case is not valid authority for the proposition for which it is cited by the RDR.

B. TRADE SECRETS ARE PRIVILEGED AND EXEMPT FROM DISCLOSURE UNDER THE CPRA

As described above, the RDR's claim of authority to disregard or override CPRA exemptions is obviously incorrect. A brief review of the statutory trade secrets privilege, which applies to financial, market share and other CALTEL member companies' confidential information, demonstrates this conclusively.

Evidence Code Section §1060 provides:

> If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.[1]

Evidence Code §1061 defines "trade secret" by reference to two other code sections:

> "Trade secret" means "trade secret," as defined in subdivision (d) of Section 3426.1 of the Civil Code, or paragraph (9) of subdivision (a) of Section 499c of the Penal Code.

Section 499c of the Penal Code in turn provides a definition of trade secret, as well as a definition of the crimes of theft, misappropriation, unauthorized copying, and breach of confidential trust relationship, and provides for fines and imprisonment for violations.

> (a) As used in this section:…

[1] The limited exception for concealment of fraud or working an injustice is applied sparingly and only on a showing that an opposing party in litigation would be unfairly disadvantaged in its proof absent the secret unless, after balancing interests of both sides, the court concludes that fraud or injustice would result from denying disclosure. Even then, the court should protect the trade secret material by considering alternatives to disclosure, *as well as requiring a protective order to prevent public disclosure*. *Bridgestone/Firestone Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 9 Cal.Rptr. 709 (trial court properly improperly granted access to trade secret tire compound formula *even though access was granted under a protective order*; the information was relevant to the case, but the defendant's trade secret interest outweighed the plaintiff's interest in obtaining access to information). This limited, highly qualified exception, permitting litigant access to the trade secrets under a protective order, obviously does not apply to CPRA requests for trade secrets which are by their nature requests that the information *be made public*.

(9) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(A) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) Every person is guilty of theft who, with intent to deprive or withhold the control of a trade secret from its owner, or with an intent to appropriate a trade secret to his or her own use or to the use of another, does any of the following:

(1) Steals, takes, carries away, or uses without authorization, a trade secret.

(2) Fraudulently appropriates any article representing a trade secret entrusted to him or her.

(3) Having unlawfully obtained access to the article, without authority makes or causes to be made a copy of any article representing a trade secret.

(4) Having obtained access to the article through a relationship of trust and confidence, without authority and in breach of the obligations created by that relationship, makes or causes to be made, directly from and in the presence of the article, a copy of any article representing a trade secret.

(c) Every person who promises, offers or gives, or conspires to promise or offer to give, to any present or former agent, employee or servant of another, a benefit as an inducement, bribe or reward for conveying, delivering or otherwise making available an article representing a trade secret owned by his or her present or former principal, employer or master, to any person not authorized by the owner to receive or acquire the trade secret and every present or former agent, employee, or servant, who solicits, accepts, receives or takes a benefit as an inducement, bribe or reward for conveying, delivering or otherwise making available an article representing a trade secret owned by his or her present or former principal, employer or master, to any person not authorized by the owner to receive or acquire the trade secret, shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by a fine not exceeding five thousand dollars ($5,000), or by both that fine and imprisonment.

(d) In a prosecution for a violation of this section, it shall be no defense that the person returned or intended to return the article.

There are specific required procedures under Evidence Code §1061 for assertion and support of claims of trade secrets, issuance of protective orders, limitations on use, and so on. There is no discretion given to the courts as to whether to follow and apply these procedures.

Section 6254 of the CPRA specifically recognizes an exemption for privileges recognized by the Evidence Code, including trade secret privilege.

> Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:...
>
> (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

Moreover, CPRA §6254.7(d) specifically exempts virtually all trade secrets from classification as public records.

> Except as otherwise provided in subdivision (e) and Chapter 3 (commencing with Section 99150) of Part 65 of the Education Code, trade secrets are not public records under this section. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

In summary, there are: (1) a trade secret privilege under the Evidence Code; (2) provisions of the CPRA incorporating Evidence Code privileges as exemptions; (3) a specific provision of the CPRA precluding public agencies from determining that trade secrets are public records; and (4) Penal Code sections criminalizing unauthorized disclosure and misuse of trade secrets.

Nevertheless, under the RDR, the Commission claims the power to ignore all of these provisions and release trade secrets of CLECs[2] and others as "public records" if, in the Commission's opinion, application of the trade secret privilege is "not appropriate."

[2] CLECs submit confidential trade secret information as part of various reports and applications that they file with the Commission. This information includes financial data, numbers of customers and lines, business model and plans information, and construction plans, among others, which are competitively sensitive. Therefore, the trade secrets privilege is of special concern to CALTEL.

The Commission plainly does not have the power to override these statutes by administrative resolution or fiat.

C. ATTORNEY WORK PRODUCT PRIVILEGE EXEMPTIONS ALSO CANNOT BE OVERRIDDEN

Attorney work product privilege is another area where the Commission simply has no authority to override the statutory privilege. The CPRA incorporates in §6276.04 the specific exemption from discovery of attorney work product in administrative proceedings provided by Cal. Govt. Code. §11507.6:

> Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

The attorney work product privilege consists of two parts. The first is subject to an absolute privilege which is not subject to a balancing test of any kind, and the second is subject to a presumption of privilege with a specific balancing test prescribed in the statute.

> a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories **is not discoverable under any circumstances**.
>
> (b)The work product of an attorney, other than a writing described in subdivision (a), is not discoverable **unless the court determines** that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.[3]

The attorney work product rule creates for the attorney a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions or legal theories. *State Comp. Ins. Fund v. Superior Court* (2001) 111 Cal.Rptr.2d 284, 91 Cal.App4th 1080, *modified on denial of rehearing, review denied*. This privilege protects the mental

[3] Cal. Civ. Proc. Code §2018.030 (emphasis added).

processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. *2,022 Ranch, L.L.C. v. Superior Court* (2003) 7 Cal.Rptr.3d 197, 113 Cal.App.4th 1377, *modified on denial of rehearing*. Neither a court nor this Commission has the authority to override the absolute privilege granted by the first part of the statute, and only a limited ability on a specific showing to override the qualified privilege provided by the second part of this statute. *Id.*; *In re Tabatha G.* (1996), 53 Cal.Rptr.2d 93, 45 Cal.App.4th 1159, *review denied* (work product rule creates a qualified privilege against discovery of an attorney's general work product and an absolute privilege against discovery of an attorney's impressions, conclusions, opinions, or legal theories; where a qualified rather than absolute privilege applies, the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice).

A similar analysis could be performed for other privileges, qualified privileges and other exemptions provided by state and federal statutes. Therefore, proposed Rule 2.2.3.1 is obviously well beyond the Commission's authority, and should be stricken in its entirety.

III. GO 66-D SHOULD NOT BE APPLIED RETROACTIVELY

CALTEL, as part of the Communications Industry Coalition, provided comments previously on the possibility that the Commission may intend the original Draft Resolution to apply to documents filed with or submitted to the Commission prior to the Commission's adoption of Resolution L-436. The RDR does nothing to alleviate these concerns. CALTEL reiterates that the Commission does not have the authority to apply

subsequently-adopted confidentiality and document release standards to documents filed under rules and assurances of confidentiality applicable at the time of filing or submission. See pages 14-15 of the Communications Industry Coalition Comments.

Without waiver of its objections, CALTEL notes that, should the Commission nevertheless regard previously filed or submitted documents as subject to the RDR, implementation will of necessity require a special set of procedures which are not encompassed by the RDR as drafted.

Documents which were submitted to the Commission previously which the submitter may regard as confidential are of various types, and include at a minimum: required reports; responses to information requests from the Commission or its staff; data and testimony in formal or informal Commission proceedings; and discovery in contested Commission proceedings which is filed as part of or in support of testimony, motions or other filings or pleadings.

These various submissions and filings of course were not submitted pursuant to the RDR. Instead, these documents were submitted in reliance on the provisions of GO 66-C or, in some cases, its predecessor general orders. As a result, few if any of the documents are accompanied by the support for their confidentiality which would be required by the RDR. Therefore, when a CPRA request is made for these documents, the party which produced the document will not have had an opportunity to assert or support confidentiality in the manner required by the RDR. At that point the Commission staff will, operating with a blank slate, be charged with determining whether and which exemptions or privileges might apply, *without any input at all from the party or parties whose confidential material may be subject to disclosure*. Obviously, the Commission

staff cannot be expected to put itself in the position of a party opposing disclosure, and is not likely to do so with the same perspective as the owner of the confidential material.

For this reason, should the Commission determine to apply the RDR to previously submitted or filed documents and information, it must create procedures whereby the party which owns the information or otherwise has a potential confidentiality interest is given adequate notice and has the opportunity to justify to the Commission why confidentiality is required or should otherwise be maintained in light of the RDR procedures and standards. These procedures should include a reasonable period and method of notice to the holder of the information, including direct notice and publication in the Commission's Daily Calendar of the existence of the CPRA request with a reasonable opportunity to respond before any determination is made by the Commission or its staff, and specification of the support required to maintain confidential treatment for these documents. Denial of continued confidential protection should permit a full right to appeal to the Commission and to the courts of the state without disclosure being made while the appeals are pending.

IV. PROCEDURAL ISSUES

A. THE RDR DOES NOT ADEQUATELY PROTECT SUBMITTING PARTIES' CONFIDENTIALITY INTERESTS

As noted above, the process by which documents are determined to be confidential or not in response to a request for records under the CPRA includes only what amounts to a dialogue between the requesting party and the Commission, and does not require that a party who has provided or filed the information be notified or have the opportunity to object to disclosure. This is fundamentally unfair to the party which has submitted the confidential information.

In those instances where the Commission or its staff has determined at the time of submission that the documents or data are confidential under the CPRA, that determination should not change merely because a CPRA request is filed. Once that determination has been made, the party which filed or submitted the confidential information should be able to rely on that determination.

In those instances where the Commission or its staff has not yet determined that the documents or data are confidential, the procedures followed should be the same as those described above for documents filed or submitted prior to the adoption of the RDR.

B. RULE 2.2.3.2 SHOULD BE MODIFIED TO REQUIRE NOTICE, OPPORTUNITY TO BE HEARD, AND TO SEEK JUDICIAL RELIEF WHEN A COMPANY'S CONFIDENTIAL INFORMATION IS SUBJECT TO SUBPOENA OR OTHER DISCOVERY

Rule 2.2.3.2 provides essentially that the Commission will turn over documents including confidential information for which the Commission receives a subpoena or other discovery request from a court or administrative agency without regard for CPRA exemptions, unless those exemptions, in the CPUC's sole opinion, are found in the Evidence Code or other specific statute. Moreover, and most significantly, under this proposed rule, the CPUC would turn over the information to a third party without any notice to the owner of the confidential information, nor any opportunity for the owner to be heard by the Commission or to take action to quash the subpoena or seek a protective order from the requesting court or government agency. This is fundamentally unfair to parties who have submitted confidential information to the Commission in good faith in reliance on CPRA exemptions or GO 66-C. For this reason, Rule 2.2.3.2 should be

amended to provide notice to the owner of the confidential information and an opportunity to be heard or to take other action to protect the owner's interests.[4]

C. PARTIES SHOULD BE AFFORDED THE OPPORTUNITY TO WITHDRAW DOCUMENTS OR FILE AN APPEAL FOLLOWING DENIAL OF CONFIDENTIALITY

Where confidential classification by the Commission is denied for a document proffered by a party in a proceeding that is not required to be produced (e.g., as part of written testimony), the document should not be disclosed without giving the proffering party the opportunity to, at its option, withdraw the document and/or appeal the finding. Once withdrawn, the documents are not public records, and would not be subject to the CPRA.

V. GO 66-C SHOULD REMAIN IN EFFECT ON AN INTERIM BASIS

The Commission should not vacate GO 66-C until it has completed the work necessary to establish matrices and processes for the evaluation of claims of confidentiality. Alternatively, on an interim basis, the Commission should import the provisions of GO 66-C into GO 66-D with respect to categories of documents which are deemed confidential.

CALTEL understood, based on informal conversations with the Legal and Communications Division staff, as well as the explanations by Legal Division staff in

[4] Exceptions should be made, however, for subpoenas under which the Commission is prohibited by law from notifying a party whose records or information has been subpoenaed For example, see: 50 U.S.C. §1861(d)(business records subpoenaed under the federal Foreign Intelligence Surveillance Act); 18 U.S.C. §3486(a)(6)(A)(subpoenas regarding federal health law violations, violation of federal laws regarding exploitation or abuse of children, and threats or offenses against persons protected by the U.S. Secret Service). A subpoena containing such a limitation will ordinarily state the limitation on its face or in an accompanying order; no research is required by the Commission when a subpoena is received as to whether such a limitation applies. Also, it seems rather unlikely that the Commission will receive subpoenas of this nature for telecommunications industry documents and data of the types which telecommunications companies typically submit to the Commission.

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response to questions at the initial workshop, that GO 66-C would remain in effect or its provisions carried forward on an interim basis as part of GO 66-D. However, inexplicably, the RDR has not been revised to provide for this, but instead terminates GO 66-C immediately, without substituting anything for it other than the provisions of the CPRA itself. This would create a great deal of uncertainty, as well as a substantial new regulatory burden for small competitive carriers, as the protection of confidentiality is worked out on a document-by-document basis.

The Commission does not have the databases or matrices which will be developed as the result of future workshops and deliberations. Until those exist, and the processes are developed for the evaluation of claims of confidentiality under the new standards, the existing standards and processes should remain in place.

VI. ADDITIONAL WORKSHOPS AND TIMING OF IMPLEMENTATION

Before creating any modifications of the process or standards applicable to CPRA requests, the Commission should complete the work for which the RDR notes that additional workshops, review and drafting are required. Again, this means that the GO 66-C processes and standards should remain in place in the interim.

VII. THE COMMISSION SHOULD DEVELOP SYSTEMS AND PROCESSES TO PROTECT CONFIDENTIAL MATERIAL EXTRACTED FROM DOCUMENTS AND REPORTS SUBMITTED TO THE COMMISSION

Based on informal conversations with the Communications Division staff, it is CALTEL's understanding that the Commission does not presently have in place adequate or consistent means of designating as confidential information extracted by the Commission staff from confidential documents. There are apparently a number of information technology issues involved in resolving this problem. Until these issues are

resolved, the Commission should develop an interim plan for maintaining the confidentiality of such information. Presumably, this would include at a minimum designating in an identifiable and visible manner all databases and documents containing extracted confidential information. Due to a lack of familiarity with current Commission capabilities and systems in this area, CALTEL cannot comment further at this time. However, this should be an early topic for subsequent workshops.

VIII. FORMS FOR SPECIFIC AREAS

Finally, CALTEL believes that the Commission should commit to developing templates for common recurring document types which typically contain confidential information. For example, CALTEL members must submit annual reports to the Commission, which contain information generally considered confidential by CALTEL members. The Commission should develop specific forms for this reporting which protects the legitimate confidentiality interests of the affected parties. This should be undertaken as part of future workshops.

IX. CONCLUSION

CALTEL appreciates this opportunity to comment on the RDR. CALTEL believes that the Commission should adopt all of its recommendations before a final version of the RDR is issued.

Respectfully submitted,

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